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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

FAIR POLITICAL PRACTICES COMMISSION,	)	Case No. 03AS04882
a state agency,)	
	)	FPPC No.: 02/522
Plaintiff,)	
	)	OPPOSITION TO MOTION FOR
v.	)	LEAVE TO INTERVENE AND
	)	MEMORANDUM OF POINTS AND
AMERICAN CIVIL RIGHTS COALITION, INC.,	)	AUTHORITIES IN SUPPORT
WARD CONNERLY, and DOES 1-50,	)	THEREOF
)	
Defendants.	)	Date: October 10, 2003
	)	Time: 9:30 AM
	)	Dept: 47
)	Judge: Hon. Michael T. Garcia
)	Date Action Filed: September 3, 2003
)	No Trial Date Set

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Defendant American Civil Rights Coalition (hereinafter, “ACRC”) is a nonprofit corporation organized under the laws of the State of California. (*Plaintiff’s Verified Complaint for Preliminary and Permanent Injunction and for Civil Penalties Under the Political Reform Act of 1974, as Amended*, paragraph 4.) Defendant Ward Connerly is the founder and chief executive officer of defendant ACRC. (*Id.* at paragraph 5.) According to defendant Connerly, defendant ACRC solicits contributions nationally in furtherance of its stated goals of ending racial preferences and classifications. (*Declaration of Sue Straine in Support of Motion for Preliminary Injunction*, paragraph 3.) Defendant ACRC was formed in 1997 after the success of California’s Proposition 209, ending government-sponsored affirmative action in California. (*Id.*)

Sometime in 2001, defendant ACRC began working to qualify a California ballot initiative that would prevent state and local governments from using or collecting racial and ethnic information about people in all but a few specified situations. (*Plaintiff's Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction*, page 3, lines 10 – 12.) Defendant ACRC has received over two million dollars in contributions used to support the qualification and passage of Proposition 54, regarding “Classification by Race, Ethnicity, Color or National Origin,” the so-called “Racial Privacy

Initiative,” and is therefore a “committee” under the Political Reform Act (the “Act”).¹ (*Declaration of Sue Straine in Support of Motion for Preliminary Injunction*, paragraph 5.)

Defendant ACRC has contributed almost two million dollars to the Racial Privacy Initiative Sponsored by American Civil Rights Coalition (the “RPI Committee”) to support the qualification and passage of Proposition 54. (*Id.*) The RPI Committee was organized as a primarily formed ballot measure committee for the purpose of supporting this initiative. (*Plaintiff’s Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction*, page 3, lines 12 – 13.) Proposition 54 is to be voted on by the People of the State of California on October 7, 2003.

All totaled, the RPI Committee’s disclosure statements filed with the Secretary of State indicate that defendant ACRC contributed \$1,917,811.84 out of the total of \$2,177,995.39 in both monetary and non-monetary contributions received by the RPI Committee through June 30, 2003. (*Declaration of Sue Straine in Support of Motion for Preliminary Injunction*, paragraph 5.) As such, Defendant ACRC’s contributions represent 88 percent of the total contributions received by the RPI Committee. (*Id.*) However, the RPI Committee’s statements do not indicate the sources of the contributions received from defendant ACRC, and defendant ACRC has failed to file any campaign disclosure statements indicating the sources of the contributions it has received. (*Id.*)

Proposed intervenors “John Doe,” representing the “Doe Class,” (hereinafter “proposed intervenors” or “Does”) are purported to be contributors to defendant ACRC, whose contributions were used by ACRC to make contributions to the RPI Committee. The proposed intervenors desire to remain anonymous, citing associational privacy and the fear of harassment to individual donors if their identities are disclosed. However, the identities of two of defendant ACRC’s donors are known at this time. The 2001 tax return of defendant ACRC discloses two contributions, in the form of loans, from Joseph Coors, in the amount of \$250,000, and from John Uhlmann, in the amount of \$190,000. (*Supplemental Declaration of Fair Political Practices Investigator Sue Straine in Opposition to Motion*

¹ The Political Reform Act is contained in Government Code §§ 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in §§ 18109 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

1 *for Leave to Intervene*, page 2 and Exhibits A and B, attached thereto.) Additionally, 125 endorsers of
2 the Racial Privacy Initiative are disclosed on the official website of the initiative. (*Id.*)

3 4 **ARGUMENT**

5 The proposed intervenors in this matter have not demonstrated the need to proceed as Does.
6 Additionally, intervention is not mandated in this matter, and no basis exists for leave to intervene being
7 granted permissively. Indeed, the proposed intervenors have provided no evidence to support a finding
8 of good cause to intervene. (Cal. Rules of Court, rule 323(a).)

9 10 **I. Proposed Intervenors Have Not Established a Legal Basis for Intervention as** 11 **Anonymous Does in the Pending Litigation.**

12 Code of Civil Procedure section 367 expressly states: “Every action must be brought in the name
13 of the real party in interest, except as otherwise provided by statute.” Code of Civil Procedure section
14 369 sets forth a limited exception to this rule, allowing certain persons to “sue without joining as parties
15 the persons for whose benefit the action is prosecuted.” (*See Powers v. Ashton*, (1975) 45 Cal. App. 3d
16 783, 787.)

17 The requirement that an action be prosecuted in the name of the real party in interest is especially
18 pertinent in the intervention setting, as any decision regarding whether to allow intervention must
19 primarily rest on a determination of the interest of the proposed intervenors in the matter at hand. (Code
20 Civ. Pro. § 387.)

21 The linchpin of the proposed intervenors’ argument for intervention is the intervening Does’
22 right to associational privacy and the fear of harassment if the identities of the contributors to ACRC are
23 disclosed. In support of this stated interest, intervenors have cited primarily *Brown v. Socialist Workers*
24 *Party*, (1982) 459 U.S. 87. However, *Brown* was based on a finding of constitutional infirmity, *as*
25 *applied*, to the members of the Socialist Workers Party. The Supreme Court held in the *Brown* decision
26 that, “Ohio’s campaign disclosure requirements cannot be constitutionally applied to the Ohio [Socialist
27 Workers Party].” (*Id.* at p. 102.) The exemption from the campaign disclosure requirements required a
28 particularized showing of harassment and retaliation against members of the Socialist Workers Party.

1 *Ibid.* In the *Brown* case, the Socialist Workers Party was a minor political party that *historically* had
2 been the object of harassment by government officials and private parties. In the instant case, Does have
3 made no evidentiary demonstration of harassment resulting from making contributions to defendant
4 ACRC. Additionally, intervenors' use of Does to hide their identities leaves this court only to speculate
5 and hypothesize as to what, if any, damage to their associational interest may occur if this case is
6 prosecuted in their absence.

7 Moreover, 125 individuals and organizations have publicly declared their support of the Racial
8 Privacy Initiative on the official RPI website, and two major contributors to defendant ACRC have been
9 publicly disclosed on ACRC's 2001 tax return. (*See Supplemental Declaration of Fair Political*
10 *Practices Investigator Sue Straine, and Exhibits A and B, attached thereto.*) Of these two contributors
11 to defendant ACRC, one contributor, Joseph Coors, is also listed as an endorser of the Racial Privacy
12 Initiative on the RPI website. (*Id.*) While it is not known if any of the other 124 of the 125 endorsers
13 are contributors to defendant ACRC, the endorsing individuals and organizations and the two known
14 contributors to defendant ACRC have not made any evidentiary showing to this Court to suggest or
15 demonstrate that they have suffered any retribution or harassment for funding and/or supporting
16 Proposition 54. If these publicly disclosed supporters have not suffered any harassment for supporting
17 Proposition 54, it appears unlikely that the anonymous parties to this action will be able to demonstrate
18 past harassment or the likelihood of future harassment for similar support. Additionally, it is
19 particularly noteworthy that the two known contributors to defendant ACRC were listed on the ACRC
20 tax return as having made their contributions for the passage of a ballot initiative. (*Id.*)

21 Allowing the proposed intervenors to now enter this litigation as Does only furthers the proposed
22 intervenors' longstanding purpose to influence a hotly contested statewide ballot measure in secret.

23 Finally, if the proposed intervenors are allowed to intervene as anonymous Does in the pending
24 action, the proposed intervenors would have a significant advantage over plaintiff FPPC. As anonymous
25 Does, proposed intervenors would be able to make claims during the course of litigation that plaintiff
26 FPPC would not be able to challenge through discovery. Specifically, plaintiff FPPC would not be in a
27 position to challenge assertions made by the anonymous Does, as plaintiff would be unable to depose or
28 obtain interrogatories from the anonymous parties. The court would, in effect, be requiring plaintiff to

1 accept as fact all assertions by the unknown parties, as plaintiff FPPC would have no outlet to challenge
2 said assertions.

3 This court must not grant the proposed intervenors' motion for leave to intervene in the pending
4 action between plaintiff FPPC and defendants ACRC and Connerly, as the anonymous parties have not
5 made any evidentiary showing for the necessity to proceed as unnamed parties. Additionally, proposed
6 intervenors cannot and have not demonstrated the necessity for mandatory or permissive intervention.

7 8 **II. Mandatory Intervention**

9 Proposed intervenors have made a request for intervention as a matter of right, also known as
10 mandatory intervention. Section 387, subdivision (b) of the Code of Civil Procedure addresses the
11 requirements for mandatory intervention. Specifically, section 387, subdivision (b) states:

12 “If ... the person seeking intervention claims an *interest* relating to the
13 property or transaction which is the subject of the action and that person is
14 so situated that the disposition of the action may as a practical matter
15 impair or impede that person's ability to protect that interest, *unless that*
16 *person's interest is adequately represented by existing parties*, the court
shall, upon timely application, permit that person to intervene.” (Emphasis
added.)

17 18 **A. The proposed intervenors' purported interest is adequately represented by the current parties to the pending action.**

19 The proposed intervenors allege in their Motion for Leave to Intervene that the interest of the
20 Doe Class is not adequately represented by defendants.

21 Defendant ACRC is currently representing the interest of the individual contributors who made
22 contributions to defendant ACRC. The United States Supreme Court has held that a nonprofit
23 membership corporation has standing to assert the personal constitutional rights pertaining to members,
24 who are not, as a matter of course, parties to the litigation. (*NAACP v. Alabama*, (1958) 357 U.S. 449.)
25 While the *NAACP* case did not involve an intervention issue, when considering a standing challenge to
26 an association representing the constitutional rights of its members, the Court held that the association
27 “argues more appropriately the rights of its members, and that its nexus with them is sufficient to permit
28 that it act as their representative....” (*Id.* at 458.)

1 ACRC is a national nonprofit organization that works to qualify ballot initiatives seeking to end
2 racial preferences and classifications. Like the NAACP, as a nonprofit membership organization,
3 ACRC is the more appropriate party in this matter to represent the rights of the individual contributors to
4 ACRC.

5 Furthermore, defendant ACRC is in the best position to represent the interests, as a whole, of *all*
6 contributors to its organization, not just the unknown party or parties who seek to intervene at this time.
7 If individual contributors are allowed to intervene in the pending litigation, the intervening parties may
8 hijack the ‘interests’ of the ‘whole’ contributor class in favor of a few contributors’ personal interests.
9 Furthermore, as a result of individual intervention, the pending litigation could quickly become
10 unwieldy as individual contributors may introduce additional and possibly conflicting arguments into
11 this matter.

12 Additionally, the proposed intervenors’ interest in the pending litigation is identical to existing
13 defendants’ interest. Both the proposed intervenors and existing defendants desire to keep anonymous
14 the campaign contributors to defendant ACRC. Defendant Ward Connerly stated, during the FPPC
15 investigation leading up to the pending action, that he would “absolutely not” disclose the names of the
16 individuals who contributed to ACRC in relation to ACRC’s contributions to the Racial Privacy
17 Initiative Committee, as he had made a commitment to these contributors not to reveal their names. As
18 such, defendant Connerly is currently representing the privacy interest and concerns at issue in the
19 pending matter regarding the individual contributors. (*Declaration of Sue Straine in Support of Motion*
20 *for Preliminary Injunction, page 2.*) Furthermore, this Court specifically recognized, when considering
21 Plaintiff’s Motion for Preliminary Injunction, that defendant ACRC’s interest in the pending litigation
22 included the interest of defendant ACRC’s *contributors*. (*Sacramento Superior Court Tentative Ruling,*
23 *Dept. 54, Cal. Date September 19, 2003, Item 10.*)

24 Finally, as a note, if this Court finds that the proposed intervenors have an interest in the pending
25 litigation requiring mandatory intervention, the court is in effect stating that mandatory intervention
26 must be approved in any situation in which a contributor has made a political contribution to any
27 committee which is the subject of litigation. This result would have a lasting and detrimental impact on
28 the judicial economy of the courts of the State of California. For example, if a committee of the

Democratic Party were subject to litigation, any contributor who made a contribution to the committee would be able to intervene in the action, when the Democratic Party committee would appropriately represent the interest(s), as a whole, of the individual contributors. Such an overly broad reading of the interest of contributors in nondisclosure is obviously untenable.

As the individual interest of proposed intervenors are adequately represented in the current matter, the Motion for Leave to Intervene under the doctrine of mandatory intervention should be denied.

III. Permissive Intervention

While the proposed intervenors have not noticed a motion to intervene under section 387, subdivision (a) of the Code of Civil Procedure, the proposed intervenors' Memorandum of Points and Authorities to support their Motion for Leave to Intervene includes an analysis of permissive intervention under section 387, subdivision (a). Although the proposed intervenors' pleadings are deficient, in the interest of judicial economy, plaintiff FPPC addresses permissive intervention.

A. The proposed intervenors' purported interest is consequential, rather than direct.

Code of Civil Procedure section 387, subdivision (a) requires that a party seeking intervention shall have an "interest in the matter in litigation." The interest of the intervenor must be "direct and immediate" rather than "remote and consequential." (*Olson v. Hopkins*, (1969) 269 Cal.2d 638, 641, *City of Burlingame v. County of San Mateo*, (1951) 103 Cal.2d 885, 890.)

"The word 'interest' is of crucial importance, and has a specific legal meaning in intervention proceedings. It is well settled that the interest referred to must be 'in the matter in litigation and of such a direct or immediate character that the intervenor will either gain or lose by the *direct legal operation and effect* of the judgment. Not only must the interest be direct rather than consequential, but 'it must be an interest which is proper to be determined in the action in which the intervention is sought.'" (*People ex rel. State Lands Commission v. City of Long Beach*, (1960) 183 Cal.App.2d 271, 274-275 (emphasis in original).)

California courts have determined that intervention will be denied under Code Civil of Procedure section 387, subdivision (a) whenever they determine that the asserted interest is *indirect, consequential,*

1 or remote, in that the threatened injury will not inevitably result from the judgment, *but rather from the*
2 *consequences of the judgment.* (See *Jersey Maid Milk Products Co. v. Brock*, (1939) 13 Cal.2d 661,
3 664-665, *Mary R. v. B & R Corp*, (1983) 149 Cal.App.3d 308, 314-315.) Additionally, “[a]n interest is
4 consequential and thus insufficient for intervention when the action in which intervention is sought does
5 not directly affect it although the results of the action may indirectly... harm its owner.” (*Continental*
6 *Vinyl Products Corporation v. Mead Corp.*, (1972) 27 Cal.App.3d 543, 550.)

7 The proposed intervenors in this matter are attempting to claim an undemonstrated interest in the
8 pending litigation where their stated proposed interest is of a consequential or indirect nature.

9 The interest of proposed intervenors in this action is indirect and consequential, as any ruling in
10 favor of plaintiff in the pending litigation would require defendant ACRC and defendant Connerly to
11 disclose, on required campaign statements, the contributions received by defendant ACRC to support the
12 RPI Committee. A favorable ruling for plaintiff would have no direct impact on proposed intervenors,
13 as they would not be required in the current litigation to make any disclosure. While such disclosure
14 may reveal that certain contributors themselves violated the Political Reform Act by not filing campaign
15 statements as major donors,² such a result would be a *consequence*, and therefore an indirect result, of
16 disclosure by defendant ACRC of its contributors. The interest of the proposed intervenors in this action
17 is therefore consequential and indirect.

18 The proposed intervenors have not established an interest in the pending litigation beyond the
19 claim, unsupported by any declaration, that they will suffer harassment if they are identified as donors to
20 defendant ACRC. At best, this interest is indirect and consequential. As such, there is no basis on
21 which this court could find good cause for permissive intervention.

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27 ² Government Code § 82013, subdivision (c) includes within the definition of “committee” any person or combination of persons who
28 directly or indirectly makes contributions, including loans, totaling ten thousand dollars (\$10,000) or more in a calendar year to, or at the
behest of, candidates or committees. This type of committee is commonly referred to as a “major donor” committee. As a major donor
committee, any contributors to defendant ACRC meeting the threshold amount would be required to file certain required campaign reports
disclosing the donor’s contribution activity. As addressed below regarding permissive intervention and the expansion of the issues before
the court, major donor reporting issues are not before the court in the current pending litigation.

B. The proposed intervention would expand the issues before the court in the current litigation.

In the Motion for Leave to Intervene, proposed intervenors contend in their statement of facts that if ACRC is found to be a “recipient committee,” at least some of the members of the “DOE Class” were required to register as a “Major Donor Committee” under the Political Reform Act. This statement is true. Yet, this statement also raises issues not currently before the court in the pending matter.

“The person seeking intervention must ordinarily show an interest under the existing pleadings and issues, and *will not be allowed to come in on a claim which enlarges the issues and changes the nature of the main proceeding.*” (*Muller v. Robinson*, (1959) 174 Cal.App.2d 511, 515, *citing 2 Witkin, California Procedure, p. 1096*) (*emphasis added*).)

Specifically, in their Motion for Leave to Intervene, proposed intervenors state that a ruling in the pending litigation, finding that ACRC is a “Recipient Committee” subject to the requirements of the Political Reform Act, “would mean that at least some members of the DOE Class were required to register as a Major Donor Committee under California Government Code section 82013(c) and to submit their own Major Donor Reports...” (*Motion for Leave to Intervene, p. 3, lines 6-11.*)

Government Code section 82013, subdivision (c) includes within the definition of “committee” any person or combination of persons who directly or indirectly make contributions totaling \$10,000 or more in a calendar year to candidates or committees. This type of committee is commonly referred to as a “major donor” committee.

Major donor committee status and filing requirements are not at issue in the pending matter. The introduction of the proposed intervenors to the pending matter would introduce issues not currently before the court, thereby not only enlarging the current issues, but also significantly changing the nature of the main proceeding.

If the proposed intervenors are granted leave to intervene, the pending suit could be significantly altered. The Court may need to consider whether any Doe contributor to defendant ACRC of \$10,000 or more was required to disclose his or her contributions on an individual major donor campaign statement, as mandated by Government Code section 84200. Additionally, the Court may need to consider whether any major donors meeting the \$10,000 threshold amount failed to file the required campaign statements.

1 Additionally, the Court may need to consider whether such a failure to file is either aggravated or
2 mitigated by defendant ACRC's conduct.

3 Additionally, other unknown interests may be introduced before the court, but as the proposed
4 intervenors are Does, these interests are not known at this time.

5
6 **C. The inconvenience or prejudice to the existing parties that would result if**
7 **intervention is permitted far outweighs the intervenors' interest in the pending**
8 **action.**

9 The court ruling upon a motion to intervene "... must balance the desirability of intervention to
10 protect a direct interest against the normal right of the original parties to the litigation to conduct their
11 lawsuit on their own terms and the potential of unduly extending the litigation." (*Continental Vinyl*
12 *Products Corporation v. Mead Corp.*, (1972) 27 Cal.App.3d 543, 552, *citing County of San Bernadino*
13 *v. Harsh California Corp.*, (1959) 52 Cal.2d 341, 346 (internal quotations omitted).)

14 In balancing the inconvenience and prejudice to existing parties against the 'interest' of the
15 proposed intervenors, the Court must consider the factors supporting denying leave to intervene against
16 the proposed intervenors' undemonstrated interest in the pending litigation. Specifically, intervention is
17 prejudicial to existing plaintiff, as plaintiff would lack the discovery tools to challenge assertions made
18 by the proposed intervenors. Furthermore, plaintiff would be unnecessarily inconvenienced as the issues
19 currently before the court would be expanded to include consequential issues not addressed in the
20 current pleadings, and such an expansion of the issues would be unnecessary as the individual
21 consequential interest of the proposed intervenors is currently represented by the existing defendant
22 organization. Meanwhile, the only factor offered by the proposed intervenors to counterbalance this
23 prejudice and inconvenience is an unsubstantiated claim that their 'interest' in anonymity will not be
24 adequately represented. Balancing these considerations, it is clear that the Court should utilize its
25 discretion to not grant permissive intervention.

26 Permitting anonymous litigants to join a pending action without demonstrating a direct interest in
27 the matter would create a logistical and practical nightmare for the existing parties and the Court. There
28 is no justification for this Court to allow intervention by the proposed intervenors in this matter.

1 **CONCLUSION**

2 Based upon the foregoing, plaintiff FPPC respectfully requests that the Motion for Leave to
3 Intervene be denied.
4

5 Dated:

FAIR POLITICAL PRACTICES COMMISSION

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By:

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Commission Counsel